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WILL KINDNESS AND AFFECTION COUPLED
WITH IMPORTUNITY CONSTITUTE SUCH
UNDUE INFLUENCE AS WILL BE SUFFI-
CIENT TO SET ASIDE A WILL.

It is axiomatic that it is profitable to be kind to everybody, as we may often by such action be entertaining angels unawares. Such was the enviable experience of Abraham, whose splendid reward for his hospitality gives the highest possible approval to his actions and has served to stir up the emulation of other people in all ages.

Kindness and affection are powerful influences. To nothing does human pride and outward austerity and hardness so quickly succumb as to kind and affectionate treatment. And this susceptibility to generous influences, inherent in some degree in every person, increases as old age advances and helplessness increases. It is at such periods in our lives we appreciate more deeply than ever the kind ministrations of our friends, and it is little to be wondered at that we should desire to reward them for their kind interest in us after death has claimed us.

So often has a crowd of disappointed heirs leaped like a pack of mad hyenas at the throat of the fortunate legatee who has drawn the richest prize of the testator's bounty because of his kind and affectionate remembrance of the testator in his declining years. We remember well a famous contested will case which arose in the city of St. Louis, not so many years ago, wherein the will of a certain Dr. Bradford was contested by a flock of nephews from other states, because the good doctor, whom they had scarcely ever visited, had thought best to give a large estate to a certain orphan asylum, located in the aforesaid city, which had made a practice of getting up entertainments in his behalf and the children of which had showed him constant affection. If abundant and overflowing affection could ever be said to constitute undue influence Dr. Bradford's will should have been promptly nullified; on the contrary, however, the court promptly dismissed the objectors together with their objections.

To make kindness and affection, however superabundant, undue influence sufficient to affect the validity of a will, would be to check at once all generous impulses and close all the well-springs of human happiness. Yet such was the contention of the appellees in the recent case of *In re Keisler's Estate*, 62 Atl. Rep. 108, where the Supreme Court of Pennsylvania denied the contention of appellees and the decree of the lower court in their favor, and held that kindness and affection did not constitute such undue influence as to nullify the will involved in that particular case.

In this case the testatrix, Mrs. Keisler, who was not very kindly treated by her children, went to live with a sister, Mrs. Merwine, the appellant, who fairly showered her with kind attentions, with the result that the helpless old lady, touched by this display of affection, whether disinterested or not is not brought out in the evidence, promptly sent for a lawyer, and after revoking a former will, leaving all her property to her children, bequeathed the great bulk of her estate to her sister. The extent of the influence exerted in this case is thus stated by the court:

"The main question raised by this appeal is that of undue influence. There is no evidence of any influence exerted directly by the appellant upon testatrix to make a will in her favor. The only part she took in procuring the making of the second will was to telephone to a lawyer to come to the house and see Mrs. Keisler, after the latter had expressed a desire to change her former will. She also wrote to the lawyer who had drawn the first will and had it in his custody, requesting him to send it to Mrs. Keisler. This she did at the latter's request. She was not present when the Stroudsburg attorney (Mr. Gearheart) saw the testatrix and discussed with her the making of a new will, nor when his stenographer, Miss Shiffer, took her instructions as to how the will was to be drawn, nor when the will was executed. There is no evidence to show that appellant was informed before the will was made that any portion of the estate was to be left to her. There was evidence that Mrs. Merwine, who was a sister, was able to influence the testatrix in her conduct, but none of the witnesses testified that she did exercise any undue influence upon her. The appellees do not in their

argument point out any such testimony. The evidence goes no further than such as this: Miss Hattie Dennison, who nursed Mrs. Keisler at West Pittston, testified that Mrs. Merwine visited her (Mrs. Keisler) at that place, and came after her there and brought her away. She was brought to Stroudsburg August 1st by Mrs. Merwine, and witness remained with her until August 24th. Her mind was very much affected at that time, and she was easily influenced by some people. Later the same witness was recalled and testified: 'Mrs. Merwine had the same effect on testatrix that I had when I went there. Testatrix was a woman whom, by being kind to, you could take over to your side, and the ones that were with her were the ones that would have her to do whatever they wanted her to do. Mrs. Merwine was always very kind and very lovely to Mrs. Keisler, and never crossed her in any way. She sent her very lovely letters and beautiful flowers, and in every way was kind to her, and Mrs. Keisler, as her condition grew weaker, became more fond of Mrs. Merwine.' There was nothing in this testimony to indicate anything more than a proper display of sisterly affection. Appellant also called a number of witnesses who testified that, both before and after she left West Pittston, Mrs. Keisler spoke to them of the kind treatment and good care she received from Mrs. Merwine, of how comfortable she was at her house, and how pleased she was to be with her mother and sister. She also complained that her children had neglected her. Mrs. Emma Coleman, a neighbor, of West Pittston, testified that shortly before she went to Stroudsburg testatrix complained to her of lack of care, and said: "'I wish if only my sister would come up. I know that, if Sally would come up, she would care for me. I will give it to Sally, if Sally takes good care of me, for there ain't none of their father's here,'" says she. "'He left me without anything but my three children, and if my children take care of me I will give them first chance, and if Sally will I shall give it to Sally.'" This was before the undue influence is alleged to have been exerted by Mrs. Merwine. Without burdening this opinion with further reference to the testimony in detail, it is sufficient to say that it presents nothing which satisfies the legal definition of undue influence."

Even supposing, however, that it had been proven in the principal case that the testatrix had been importuned to make her will in favor of the appellant, this would certainly have added no element of undue influence to the legitimate influences already being exerted. It is certainly not a cause for complaint from other heirs that one of their number drew the biggest prize out of the testator's estate by reason of his importunities coupled with a display of affection, provided such importunities did not *control* although they may have powerfully influenced the decision of the testator. And in this connection we are reminded of the very clear and suggestive comment of Judge Dean of the Supreme Court of Pennsylvania in the case of *Robinson v. Robinson*, 203 Pa. 401, where the learned judge says: "A son may importune his mother to make a will in his favor. * * * He has a perfect right to do it, and if the only effect was to move her affections, or sense of duty, or judgment, he has a perfect right to do it. But if these importunities were such as the testator had not the power to resist, and yielded for the sake of peace and quiet or escaping from serious distress of mind, if they were carried to a degree by which the free play of testator's judgment or discretion or wishes were overcome, it is undue influence. He can coax her, but he must not drive her, either by moral coercion or physical force."

NOTES OF IMPORTANT DECISIONS.

LIFE INSURANCE—MUTUAL COMPANIES MAY BE COMPELLED TO SHOW BOOKS TO POLICY HOLDERS.—That a policy holder of an insurance company is entitled to an inspection of the list of its policy holders, though he may not be entitled to familiarize himself with the extent and nature of all the policies and the names of the beneficiaries, was held by Judge Greenbaum, of the New York Supreme Court on Dec. 28, 1905. To this extent, he granted the application of Clarence H. Venner, who for nineteen years has held a policy of \$50,000 in the New York Life Insurance Company, for a writ of *mandamus*, directing John A. McCall, president of the company, to furnish him with a list of the policy holders and their addresses, or to permit an inspection of the same.

This decision is a decided victory for the policy holders, who for years have met every obstacle in their efforts to obtain a list of the policy holders. Venner, in addition to being a policy

holder, holds powers of attorney for ninety other policy holders, authorizing him to act in these proceedings. He, and those who act with him, seek to obtain the list in order that they might take steps to act collectively when the annual election of trustees takes place, in April 1906, at which time every policy holder is entitled to vote. The officers of the company strongly objected to the issuance of any writ, saying that a policy holder is not entitled to an inspection of the books, but, if he was, the court would not use its discretion to that end, and, furthermore, that Venner, and his associates were not acting in good faith, or with proper motives, but for objects detrimental to the company. Justice Greenbaum's decision is a very long one and says in part:

"The petitioners allege that the sole purpose of the information is to enable them and other policy holders to co-operate effectively in the annual election of trustees of the company, to be held in April next. The application is opposed upon the ground that a policy holder in a mutual company is not entitled to an inspection of its records; that the relation of a policy holder to the company is purely contractual, measured by the terms of the policy, and that no trust relationship exists between them. It seems to me, however, that this phase of the status of the policy holder toward the company is foreign to the question here presented. It is not denied that, in a circular recently issued by the company, the right of every policy holder to vote for trustees at each election is expressly recognized, and it is admitted that the persons voting at the annual election for trustees are policy holders. It is, therefore, evident that, regardless of the relationship between a policy holder and a mutual company in other respects, the right of a policy holder to vote is analogous to that of a stockholder of a stock corporation. I have no doubt of the common-law right of a policy holder of a mutual company to inspect the rolls of the policy holders, so that full opportunity may be offered for conference and communication with other policy holders in the matter of election of officers of the company. It remains only to consider if the petitioners are acting in good faith and with proper motives.

Assuming even that Mr. Venner seeks in some way improperly to advertise himself by securing either the election of himself or some subservient tools on the Board of Trustees, it must be evident that such a result could not be accomplished unless we also assume that a sufficient number of the 700,000 policy holders of the respondent's company are prepared to submerge their self-interests. Nor would it be just to assume without some proof, that the ninety policy holders behind Mr. Venner are actuated by improper motives. I have not the least hesitancy to disregard the allegations of bad faith for the reason that their affidavits frankly concede that numerous other applications of policy holders have

been made and refused. Justification for refusing the inspection is based upon the serious business inconvenience that would result thereupon to the company by reason of the fact that the only records of the company which have names and addresses of the policy holders are on cards, which also contain information as to the amount of the policies, the premiums, the beneficiaries, etc. It is urged that such inspection might work serious injury to the respondent company, to the advantage of rival companies, who may avail themselves of these lists, and that permission to inspect the cards would operate as a breach of the confidence reposed in the company by policy holders who regard such information as confidential. It may be the policy holders would not desire to permit others to become familiar with the extent and nature of the insurance policies, or of the beneficiaries, and I find no reason for giving the right to the petitioners to acquire such information; but I cannot believe that policy holders would desire to conceal the fact that they are policy holders of the respondent company.

The claim that confidential information might be secured from an inspection of the cards, is entitled to no consideration, as it would seem to me a proper and necessary equipment of the respondent's company to have a special list of the names and addresses of its policy holders for convenient references, and its failure to have such a list should not affect the right of the petitioners to an inspection. If it is not practicable in a short time to prepare the list, suitable provision may be made to give the desired information without permitting the petitioners to copy other matters appearing on the cards. The application for a writ is granted, limited in its scope as above indicated."

STREET RAILROADS—INJURY TO CHILD PLAYING ON STREET AND SUDDENLY STEPPING ON TRACK.—Counsel for plaintiffs in damage suits against street railway companies are continually losing sight of a great principle in the law of negligence that even though a street railroad employee may see ahead of his car, children playing on the street ahead of him, and even far ahead enough to permit him to stop his car and avoid injury to any of them should any of them suddenly dart across the track, he is not bound to anticipate the sudden movement of the child. To charge a street railroad company with the unanticipated and sudden movement of pedestrians on the street ahead of an approaching car, would be intolerable. If the movement of a pedestrian in front of an approaching car could and should have been reasonably anticipated by the motorman, the company is of course liable for injury to him, as where, for instance, a child, to take a strong case, leaves the sidewalk at a regular crossing, not in play but with evident intention to cross to the other side, and the motor-

man observes such movement in time to check the car, the company will be liable for injury to the child, on the ground that the movement of the child could have been easily anticipated. But where the same child is playing on the sidewalk or street, running back and forth with no evident movement or intention to cross the street, and as the car approaches, suddenly darts across the track, the company is not liable, even though the motorman had observed the movements of the child far enough ahead to have stopped the car, on the ground that the intention of the child to cross the track could not have been reasonably anticipated by the motorman, and for the further reason that it is not the policy of the law to impose upon a defendant liability for an injury caused by the unexpected movement of the party injured.

The principle just stated is well illustrated in the recent case of *Leitzel v. Harrisburg Traction Company*, 62 Atl. Rep. 102. In this case it appeared from the evidence that the plaintiff, a boy nine years of age, was injured by suddenly darting from behind a wagon on to a street car track in front of a car approaching from behind. The evidence further showed that the motorman saw the boy and a companion walking behind a wagon, 100 yards ahead of him, and going in the same direction about two feet to the right of the track, and slowed up, but that just as the car neared the wagon the plaintiff darted across the track and was injured. The Supreme Court of Pennsylvania, in deciding that no negligence was proven by the plaintiff's evidence sufficient to entitle it to go to the jury, says: "What was there in the situation before the motorman to suggest to him or require him to anticipate that the plaintiff, who was intent upon following the wagon, so far as the motorman could see, just as the car reached him, would step suddenly to the side upon the track in front of it? There is nothing in the evidence that we can discover. In what, then, did the motorman fail? Was it his duty to refrain from passing the boys and the wagon? Was it his duty to follow behind them until the wagon or the boys left the street? Was it his duty to stop the car and chase the boys away from behind the wagon before he proceeded past it? If such was not his duty, of what act of negligence was he guilty? What act of omission or commission has he been guilty of which would make him blamable for the unfortunate injury to the boy? He sounded his gong. He approached the boys and the wagon with the car under his control, and at a very slow rate of speed, and just as he reached them the plaintiff stepped in front of the car and was injured. It is not the case of running upon him while in the space between the tracks and the wagon, so that he was caught there and because of the narrow way was struck by the fender, for the evidence shows that he stepped upon the tracks. His collision with the car was due to his sudden movement towards

and upon the track. It is the duty of the plaintiff to show that his injury was due to some act of negligence on the part of the defendant. This, as we view the evidence, he has not done. We think the case comes within the class of cases where a child suddenly and unexpectedly runs or steps in front of a moving car, and gives rise to an imminent danger against which there is no opportunity to guard."

The authorities in other states fully sustain the rule laid down by the court in the principal case. Thus a street railroad company was held not to be liable for injuries to a child who, as the car approached, was at a safe distance from the track, but suddenly threw herself in front of the car before the motorman could slacken the speed. *Paducah Street Railway Co. v. Adkins*, 14 Ky. Law Rep. 425. So also in an action for damages for the death of a boy nine years old, it appeared that decedent came from behind some wagons, and fell while attempting to run across the street. The court held that defendant was not chargeable with negligence. *Bello v. Metropolitan Street Ry. Co.* (Super. N. Y.), 14 Misc. Rep. 279, 35 N. Y. Supp. 931. See also to same effect: *Chilton v. Central Traction Co.*, 152 Pa. 425, 25 Atl. Rep. 606; *Citizens Street Ry. Co. v. Carey*, 56 Ind. 396; *Hearn v. St. Charles Street Ry. Co.*, 34 La. Ann. 160; *Boland v. Missouri Ry. Co.*, 36 Mo. 484; *Wolf v. Railroad Co.* (N. Y.), 50 Hun. 604; *Flanagan v. People's Ry. Co.*, 163 Pa. 102, 29 Atl. Rep. 743; *Gallaher v. Railway Co.*, 37 La. Ann. 288; *Doeman v. Railway Co.*, 117 N. Y. 655; *Foy v. Street Railway Co.* (Cir. Ct.), 3 Ohio Dec. 22, 10 Ohio Cir. Ct. Rep. 151; *Miller v. Union Traction Co.*, 198 Pa. 639; *Dallas City Railway Co. v. Beeman*, 74 Tex. 291; *McLaughlin v. Railway Co.*, 48 La. Ann. 23, 18 So. Rep. 703; *Fenton v. Railway Co.*, 126 N. Y. 625, 26 N. E. Rep. 967; *Funk v. Traction Co.*, 175 Pa. 559, 34 Atl. Rep. 861; *Trumbo's Admr. v. Street Car Co.*, 89 Va. 780, 17 S. E. Rep. 134.

CRIMINAL TRIAL—COMPELLING THE PROSECUTION TO ELECT ON WHICH COUNT IN AN INDICTMENT THE INTENTION IS TO RELY.—It is a common practice among prosecuting attorneys to charge the same crime in many, or even a multitude of counts. While such is the privilege of the prosecution, and a privilege which is perfectly fair and reasonable in view of the inconsistent statements of prosecuting witnesses before trial, yet it must be remembered that the prosecutor has carefully planned his attack from many sides, bewildering not only to the accused but to the court and jury as well, and that, in justice to the accused, the prosecution, after it has brought in its evidence and knows where it stands, should be compelled to define definitely its lines of attack. The justice of this salutary rule, often overlooked, was brought out prominently in the recent case of *State v. Barr*, 62 Atl. Rep. 43, where the Supreme Court of Vermont held that where, on a trial under an information contain-

ing several counts charging the sale of liquors without a license, the state gave evidence showing the several offenses charged, it was error to refuse at the close of the testimony to require the state to elect on which count it would rely for a conviction, though the court ruled that there could be a conviction of no more offenses than there were counts, and that each offense must be found on evidence particularly relating to it.

The particular case referred to above was on an information in six counts for selling and furnishing intoxicating liquor without a license. The court said: "As each sale was a separate offense, it was error for the court to refuse at the close of the testimony to require the state to elect the occasions on which it would rely for conviction under the counts for selling, and to allow the case to go to the jury on all the evidence of sales, although it ruled that there could be a conviction of no more offenses than there were counts and charged that each offense must be found on evidence particularly relating to it. Although that was a question of practice, addressed to the discretion of the court, still that discretion was to be exercised within the bounds of the law, which are pretty well defined in such cases. *Hubbard v. Hubbard*, 77 Vt. at page 77, 58 Atl. Rep. 969, 67 L. R. A. 969. The object of an election being, whether of counts or offenses, to save the prisoner from embarrassment in his defense, the cases say that as a rule it should be made before the prisoner is called upon to put in his evidence. Thus, in *State v. Smith*, 22 Vt. 74, this court said there is much good sense in what *Alderson, J.*, said in *Wigglesworth's* case, that the election ought to be made, not merely before the case goes to the jury, but before the prisoner is called upon for his defense, and approved of that as satisfactory. *State v. Willett*, 78 Vt. —, 62 Atl. Rep. 48. The special circumstances of a case may make it proper to defer election till the testimony is all in. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. Rep. 410, 38 L. Ed. 208. But then it should be made before summing up. *Woodford v. People*, 62 N. Y., at page 131, 20 Am. Rep. 464."

The more recent cases approve the rule laid down in the principal case. Thus in a prosecution for rape, where several acts of intercourse were proved, the state was allowed to go to the jury on all of them, and held error; for, each act being a separate offense, the state should have been put to elect which it would rely upon. *Powell v. State* (Tex. Cr. App., Oct. 1904), 82 S. W. Rep. 516. It is held in Kentucky that where several separate offenses are proved, though the indictment is general, the state must elect, and cannot submit them all to the jury. *Commonwealth v. Illinois Central R. R. Co.* (Ky. Ct. App., Oct. 1904), 82 S. W. Rep. 381. In *Smith v. Commonwealth*, 109 Ky. 685, 60 S. W. Rep. 531, that court said that the state should not be allowed to prove a number of separate offenses be-

yond what are charged, and submit them all to the jury, to catch the prisoner in a dragnet of offenses.

ENLARGEMENT OF A LIFE ESTATE BY AN ACCOMPANYING POWER OF DISPOSITION.

Connected with the question discussed in a recent number of the *CENTRAL LAW JOURNAL*¹ is the question whether the devise of a life estate in lands is enlarged to a fee by an accompanying power of disposition in fee, a question which is liable to arise under the provisions of many of the inheritance tax laws which exempt a life estate.

The proposition that if one has absolute power to dispose of the fee in his pleasure, he is in effect vested with the fee, has a certain plausibility and has often been presented in the courts; but the authorities generally seem to reject it. Chancellor Kent in his *Commentaries*,² after explaining why a limitation over, after a general devise of an estate in fee is prohibited, adds, that "if an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee; unless the testator gives to the first taker an estate for life only and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power and prevent it from enlarging the estate to a fee." So, Judge Redfield, in his work on Wills,³ declares that "a power of sale attached to an express life estate will not have the effect to enlarge it to a fee." Mr. Beach, in the first edition of his work on Wills, declares the law in these words: "Nor is a devise, clearly expressed for life, enlarged to a fee by a power to sell or to appoint by deed or will."⁴ And Judge Woerner, in his work on the Law of Administration, sec. 439, after adverting to the doctrine that a devise over after a fee, with a power of absolute disposition, is void, proceeds as follows: "It should be observed that the rule does not apply to a power of disposition given to the donee of an estate expressed to be for life only; the addition of

¹ Vol. 60, p. 441.

² IV, 135.

³ II, 336*

⁴ Sec. 202, n. 6.

the power does not enlarge the life estate into a fee, and the devise over will be good." Many adjudicated cases assert the same doctrine. In *Fairman v. Beal*,⁵ the devise is as follows: "To my beloved wife the farm on which I now live * * * during her natural life to take the issues and profits thereof; at her death she may dispose of it as she pleases." The court says: "The creation of the life estate controls the operation of the power and prevents it from enlarging the estate to fee." In *Flintham's Appeal*, *Tilghman, C. J.*, says: "The law is well settled, that if there be a bequest of a sum of money to a person to be disposed of at his death as he pleases, it vests in the legatee and goes to his representatives, though he makes no appointment nor disposition of it by will or otherwise. But if it be given for life with power to dispose of it at his death it does not vest absolutely and shall not go to the representatives of the legatee unless some disposition be positively made of it."⁶ And *Gibson, J.*, laid down the law in these words: "A power of disposition at death engrafted on an express limitation for the life of the legatee will not enlarge his interest by implication." In *Terry v. Wiggins*,⁷ the court says: "A power of sale attached to an express life estate will not have the effect to enlarge it to a fee," citing *Dean v. Nunnally*.⁸ In *Hinkle's Appeal*,⁹ the will was in these words: "To have and to hold the said estate during his life for his own use and enjoyment as he may see fit, giving my said husband full power to sell and dispose of the same during his life as he may desire, with full power to convey * * * and make good and sufficient title and conveyances during his life." The court held that the devisee took only a life estate. The opinion declares the rule to be that "A power of sale attached to an express life estate will not enlarge it to a fee." In *Walker v. Pritchard*,¹⁰ the Supreme Court of Illinois had occasion to again examine the question. The will was as follows: "I bequeath to my beloved wife Eloti in lieu of dower," certain lands * * * "with full power and

authority to sell and convey the title to the above lands at any time and convert the avails to her own use and benefit." The court held that the wife took nothing but a life estate, though with power to convey a fee. In the Court of Appeals of Kentucky the same question arose in *Koenig v. Kraft*,¹¹ the will was as follows: "I bequeath to my beloved wife Elizabeth all my estate for her and her child, Emma Kraft's sole use and benefit, and give my beloved full power and authority to sell my real estate." Held, that the widow took a life estate merely, for the use and benefit of herself and child, and the remainder in fee went to the child at the mother's death. In *Welsh v. Woodbury*,¹² the testator devised his estate to his wife "during her natural life," for her support, etc., and then added these words, "and I hereby give her power to sell in her sole and individual name any of my personal or real estate and to convey and transfer by deed or other instrument in her own name for the above named purposes or for investment or re-investment." Then there was a limitation over to his sister. The court says, *Holmes, J.*: "The testator's wife took a life estate coupled with the power, and the limitation to his sister, Mary Hobbs, was valid." In *Harbison v. James*,¹³ the devise was to the wife of "all my property, real and personal * * * giving her the right to sell and re-invest as she may desire, any part of the same for her support, use and benefit," and with a remainder over of what remained undisposed of, to his daughters. The court held the wife took a mere life estate with the power of sale, and that this included the power of mortgage. In *McCullough v. Anderson*,¹⁴ the will was in these words: "To my most precious and well beloved wife I give during her life all my estate, real and personal * * * with full and ample authority to dispose of the whole as she pleases," with remainder over to the daughter of what remained undisposed of by the wife. The court held, unhesitatingly, that the power of sale did not enlarge the life estate, and that the wife took for her life only.

The Supreme Court of Virginia considered the question in the case of *Smythe v.*

⁵ 14 Ill. 244.

⁶ 11 S. & R., p. 16.

⁷ 47 N. Y. 517.

⁸ 36 Miss. 358.

⁹ 116 Pa. St. 490, 9 Atl. Rep. 938.

¹⁰ 121 Ill., 12 N. E. Rep. 337.

¹¹ 87 Ky. 95, 7 S. W. Rep. 622.

¹² 144 Mass. 542, 11 N. E. Rep. 769.

¹³ 90 Mo. 411, 2 S. W. Rep. 292.

¹⁴ 90 Ky. 126, 13 S. W. Rep.

Smythe.¹⁵ The will was as follows: "I give to my two sisters Kate and Mattie, all my estate, real and personal, to be by them used and enjoyed during their natural lives * * * carrying with such use and enjoyment the right to sell and convey such real estate, should they find it desirable to do so * * * and at the death of my two sisters I desire whatever of my estate may remain shall vest in and become the property of my little boy Claude." The court say that the court below decided that Kate and Mattie Smythe take under the will only a life estate and do not take an absolute fee simple. * * * We are of opinion that the construction of the will by the circuit court as aforesaid is just and proper."

The question was before the Supreme Court of California, in the case of *Morffew v. San Francisco Company*.¹⁶ The will was as follows: "I bequeath all my property both real and personal to my beloved wife Susan Crooks, in trust for our children. * * * It is my wish and desire that my wife shall have control of my estate as well as the income from it during her natural life * * * and that on the death of my wife after my youngest child shall have attained the age of twenty-one years, the estate shall be divided." It was contended that the wife took not merely a life estate but the fee in trust; and that the power of sale being added she thus had a power coupled with an interest in the fee; but the court says that, "there is no enlargement of her life estate to be implied from the necessities of the trust; and the life estate in the trustee being created by express words in the will with limitation over, is not enlarged to a fee by the power of sale."¹⁷ In *Payne v. Johnson*,¹⁸ the Court of Appeals of Kentucky quote and approve the doctrine of Chancellor Kent, before quoted, that where a life estate is given with power of disposition "the express limitation for life will control the operation of the power and prevent it from enlarging the estate into a fee." In *Brady v. Brady*,¹⁹ the provisions of the will were as follows: "I give and bequeath to my wife for and during her natural life, all my

estate, real and personal, * * * and the same to dispose of in all respects as she may think proper." The court held that she took a mere life estate, and the court quote the opinion of the Supreme Court of Rhode Island, which we have not seen elsewhere reported, in these words: "When in a will the gift of the first taker is expressly limited to him for life it is not enlarged into an absolute gift by the mere annexation of the power to him to dispose of or appropriate the fee of the capital." In *Ernst v. Foster*,²⁰ the court says: "We agree with the contention of the heirs, that the power of disposal given in the will did not enlarge the estate taken by the widow, to a fee. There was devised to her a life estate, and added to that was the separate and distinct gift of the disposal of the fee. This gave her authority to convey the fee and the part undisposed of would extend to the children in accordance with the will." In *Evans v. Folks*,²¹ the testator devised to his wife "My whole estate * * * real and personal, absolutely and to the use of her own interest and benefit during her natural life * * * with full power and authority to dispose of any and all of my real or personal estate as she may think best or see fit." There was a provision that at the death of his wife, if there should be anything left it should be divided between the heirs of his two brothers. Now, upon this the court says: "The authorities all hold that when there is a devise for life in express terms and also a power of disposal conferred by the will upon the devisee, it does not enlarge the estate to a fee simple."

In *Kaufman v. Breckenridge*,²² the Supreme Court of Illinois held that not only does not the power of disposition enlarge the life estate, but the devise of an estate for life limits the power, so that the devisee can sell nothing but his or her life estate, and in a note to this case it is declared that "where a life estate only is clearly given to the first taker with an express power * * * to dispose of the property the life estate is not by such a power enlarged to a fee or absolute right and the devise over will be good."²³ In *Wiley v. Gregory*,²⁴ the question came before the

¹⁵ 90 Va. 638, 19 S. E. Rep. 175.

¹⁶ 107 Cal. 387, 40 Pac. Rep. 810.

¹⁷ The court cites the case of *Poos v. Scarf*, 55 Md. 310, and other cases.

¹⁸ 95 Ky. 175, 24 S. W. Rep. 238.

¹⁹ 78 Md. 461, 28 Atl. Rep. 515.

²⁰ 58 Kan. 438, 49 Pac. Rep. 527.

²¹ 37 S. W. Rep. 126.

²² 117 Ill. 305, 7 N. E. Rep. 666.

²³ The court cites *Ramsdell v. Ramsdell*, 21 Me. 288; *Shaw v. Hussey*, 41 Me. 495.

²⁴ 37 N. E. Rep. 507.

Supreme Court of Indiana. The will devised to the wife all the testator's property "during her natural life, to use, enjoy and dispose of as she may desire," with remainder over of "all that remains undisposed of," to the children.

The court, citing the passage above quoted, from Kent's Commentaries, says: "It seems to be well settled by numerous authorities that where a particular estate is expressly devised a contrary intent is not to be implied by subsequent words; and that an express life estate cannot generally be enlarged by implication," and the court cites *Dunning v. Van Dusen*,²⁵ where the court quotes *Denson v. Mitchell*,²⁶ in these words: "The authorities, both English and American, seem generally to agree that an express estate for life given by will negatives the intention to give the absolute property and converts words conferring a right of disposition into words of mere power."

²⁵ 47 Ind. 423.

²⁶ 26 Ala. 380.

CAN CONGRESS REGULATE THE BUSINESS OF INSURANCE?

The Supreme Court of the United States seems irrevocably committed to the position that the business of insurance is not interstate commerce, although the contracts are made between residents of different states. In *Paul v. Virginia*,¹ it was held that a law of Virginia requiring foreign companies to procure a license and deposit specified securities as a condition to doing business in the state was valid and did not interfere with the right of congress to regulate commerce between the states because the business of insurance was not interstate commerce. The court said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire entered into between the corporation and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word; they are not subjects of trade and barter offered in the market as something having an existence and value independent

of the parties to them; they are not commodities to be shipped or forwarded from one state to another and then put up for sale; they are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions though the parties may be domiciled in different states. The policies do not take effect, are not executed contracts, until delivered by the agent in Virginia. They are then local transactions and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce." This case is cited and followed in *Liverpool Ins. Co. v. Oliver*.²

In *Fire Association of Philadelphia v. People of State of New York*,³ in upholding the "retaliation" clause in the New York Insurance Law, the court referred to the ruling in *Paul v. Virginia*, that "issuing a policy of insurance is not a transaction of commerce," and said: "This decision only followed the principles laid down in the earlier cases, citing several." In *Hooper v. State of California*,⁴ it was held that the business of a foreign company writing marine insurance is not protected by the interstate commerce clause of the constitution. The court said: "The contention here is that inasmuch as the contract was for marine insurance it was a matter of interstate commerce and as such beyond the reach of state authority and included among the exceptions to the general rule." This proposition involves an erroneous conception of what constitutes interstate commerce; that the business of insurance does not generically appertain to such commerce has been settled since the case of *Paul v. Virginia*.⁵

While it is true that in *Paul v. Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance of any kind constituted

² 10 Wall. 586, 19 L. Ed. 1029.

³ 119 U. S. p. 110-129, 30 L. Ed. 342.

⁴ 155 U. S. 648-664.

⁵ *Supra*. See also *Philadelphia Fire Association v. New York* and authorities there cited.

¹ 8 Wall. 168-196, 19 L. Ed. 357.

interstate commerce. The court in reaching its conclusion upon this question was not concerned in any matter of distinction between marine and fire insurance but proceeded upon a broad analysis of the nature of interstate commerce and of the relation which insurance contracts generally bear thereto.

The business of insurance is not commerce, the contract of insurance is not an instrument of commerce, the making of such a contract is a mere incident of commercial intercourse and in this respect there is no difference whatever between insurance against fire and insurance against "the perils of the sea." In *New York Life Insurance Company v. Cravens*,⁶ the court held that the Missouri "Non-forfeiture Act" was not a regulation of interstate commerce, saying: "Is the statute an attempted regulation of commerce between the states, in other words, is mutual life insurance commerce between the states?"

That the business of fire insurance is not interstate commerce is decided in *Paul v. Virginia*,⁷ *Liverpool & L. L. Fire Insurance Co. v. Massachusetts*,⁸ and *Philadelphia Fire Association v. New York*.⁹ That the business of marine insurance is not, is decided in *Hooper v. California*.¹⁰ In the latter case it is said that the contention that it is "involves an erroneous conception of what constitutes interstate commerce." We omit the reasoning by which that is demonstrated and only repeat, "the business of insurance is not commerce; the contract of insurance is not an instrumentality of commerce; the making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea, and we add—or against the uncertainty of man's mortality."

It is noteworthy that the decision in each case upon this point was unanimous and the construction of the term "commerce between the states," as used in the constitution, would seem forever settled, so far as its application to insurance is concerned, and if the business of insurance under the settled construction of the constitution is not commerce

in fact it cannot be made such by legislative fiat. Where congress possesses the power to act it is undoubtedly the sole judge of the character and extent of such action. If the power exists and is exercised, it will to that extent exclude state supervision, and the question of the wisdom of such action would become pertinent; but so long as the power of congress to regulate is constitutionally limited to "commerce" between the states, and the supreme court so construes the term as to exclude insurance, federal regulation is impossible and its wisdom need not be discussed.

It may be noted in passing that a majority of the supreme court in the recent case of *Champion v. Ames*,¹¹ held that the carriage of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state is interstate commerce. Mr. Chief Justice Fuller dissented in a vigorous opinion, which was concurred in by Justices Brewer, Shiras, and Peckham, on the ground that the question had been foreclosed by the court in holding that the issue of fire, marine, and life insurance policies in one state and sending them to another, to be there delivered to the insured on payment of premiums is not interstate commerce.

I. M. EARLE.

Des Moines, Iowa.

¹¹ 188 U. S. 321-375, 47 L. Ed. 492.

MUNICIPAL CORPORATIONS—DEFECT IN SEWAGE SYSTEM—FAILURE TO REPAIR.

HART V. CITY OF NEILLSVILLE.

Supreme Court of Wisconsin, Oct. 3, 1905.

Though a city is not liable for damages to private property caused by mere defects in the plan of its duly adopted and executed sewage system, if it acquires knowledge of such defects and that unless they are remedied they will produce direct injury to private rights, it should exercise ordinary care to prevent such a result, and is responsible for damages caused by failure in that regard.

If, by reason of defects in a plan of sewage contemplating that private property will, as a matter of right, be connected therewith, such property is injured because of water accumulated in a sewer flowing therefrom through such a connection to such property, the injury is direct within the meaning of the last foregoing rule.

Statement of Facts: This is an appeal from an order sustaining a demurrer to the complaint for

⁶ 178 U. S. 389-401, 44 L. Ed. 1116.

⁷ 8 Wall. 988, 19 L. Ed. 357.

⁸ 10 Wall. 566, 19 L. Ed. 1029.

⁹ 119 U. S. 110, 30 L. Ed. 372, 7 Sup. Ct. Rep. 108.

¹⁰ 155 U. S. 648, 39 L. Ed. 297.

insufficiency. The material facts stated in the pleading for a cause of action are these: For more than 20 years last past plaintiff has owned and occupied as a family home a lot in the city of Neillville. Under all parts of the dwelling house thereon there is a basement walled up with stone, and a well adjacent thereto upon which the family depend for a water supply. From time to time prior to July 3, 1903, without having adopted any system therefor, said city by its authorized officers constructed a sewer system and maintained the same to drain property abutting upon some of its streets. In July, 1902, at the expense of the owners of abutting property said city constructed a sewer along the street in front of plaintiff's lots for the purpose of draining such abutting property, plaintiff paying the cost thereof apportioned to his lots. An opening was left in such sewer to enable him to connect therewith a drain leading from his basement thereto. In October thereafter such connection was made. The sewer system of the city was negligently constructed and maintained in that no plan was adopted therefor by the city; the pipe on the street last mentioned from the outlet thereof was too small to properly dispose of the sewage turned into it; catch basins were so placed as to direct into the sewer surface water much in excess of its capacity, the sewer was not laid at a proper slope to make it efficient. a part of the sewer system was so constructed as to turn surface water flowing down a ravine known as "Goose Creek" into it, to such an extent as of itself to fill the pipe so that the added water from catch basins and ordinary drainage necessarily caused sewage to back up into the sewer in front of plaintiff's premises and through the pipe leading to his property into his basement. By reason of such defects, at various times between July 3, 1903, and March 24, 1904, such basement and the well aforesaid were flooded from the sewer, rendering the well useless and the home for considerable periods of time untenable, and at other times unsuitable for residence purposes, causing the basement wall under the house to settle and to a considerable extent to fall, and the house to settle and crack and otherwise to be injuriously affected, to his damage in the sum of \$1,500. The defendant knew during the time of the construction of the sewer system that it was not proceeding according to any plan having regard to the work that would be required of such system; that the work was being negligently done and that the system would be inefficient. After the system was constructed the defendant had notice of the insufficiency aforesaid which caused the damages complained of.

MARSHALL, J. (after stating the facts): The learned trial court held the complaint to be fatally defective, supposing from the facts alleged, that the injuries complained of were produced by defects in the original plan of the sewer; and that since such defects were rendered injuriously operative as to appellant's property

by his voluntary act in connecting his private drain with the main sewer, the result was not referable to any fault of the respondent. The reasoning which resulted in such conclusions is embodied in an elaborate opinion by the judge containing a careful review of numerous authorities supposed to be in point.

While the law is well settled that, in case the governing body of a city, duly authorized thereto by its charter, adopts a plan for a sewage system and executes the same, it is immune from injuries resulting to private property, not involving an unconstitutional taking thereof, but which are referable to defects in the plan itself—*Gilluly v. City of Madison*, 63 Wis. 518, 24 N. W. Rep. 137, 53 Am. Rep. 299; *Champion v. Town of Crandon*, 84 Wis. 405, 54 N. W. Rep. 775, 19 L. R. A. 856; *Schroeder v. City of Baraboo*, 93 Wis. 95, 67 N. W. Rep. 27; *Child v. City of Boston*, 4 Allen (Mass.), 41, 81 Am. Dec. 680; *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. Rep. 923, 30 L. Ed. 75; 2 *Dillon's Municipal Corporations* (4th Ed.), § 1051—the mere circumstance of the construction of a sewage system by the properly authorized officers of a city does not satisfy that rule. The basic principle thereof is that discretionary authority being vested in the governing body of a city to adopt a plan for a system of sewage, defects in a plan so adopted are referable to mere errors in judgment, and as regards resulting liability for injuries to private rights, are governed by the same rule as mistakes generally in the exercise of quasi judicial authority. It follows necessarily that where such authority is not exercised at all, where though a system of sewage is constructed by a city without any plan therefor, passed upon and adopted by the governing body of the corporation, the reason for exempting it from liability for defects attributable to faults in the plan does not exist. It is not the mere construction of a sewage system by a city which exempts the corporation from liability for injuries caused by its operation growing out of defects in the plan thereof, but such construction according to a plan stamped with judicial approval, so to speak, of the proper governing body.

It has been held, as indicated by cases cited by appellant's counsel, that in order to satisfy the rule stated the city council must not only adopt a plan, but do so with sufficient care to warrant the belief that legal discretion was exercised in the matter; that action in reckless disregard of consequences, as by adopting a palpably defective plan, or adopting one without the aid of some skilled person, where that in all reason is required, cannot reasonably be attributed to mere error of judgment. *City of Louisville v. Norris*, 111 Ky. 903, 64 S. W. Rep. 953, 98 Am. St. Rep. 437; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. Rep. 686.

The sufficiency of the complaint before us does not depend upon our going to the length of the two cases last cited. It states plainly that the

system of sewage was not constructed according to any plan adopted by the city; that on the contrary the city negligently failed to adopt any plan.

The trial court held contrary to the foregoing upon the theory that the allegation in respect to failure to adopt a plan was intended merely to charge that the city did not employ a skilled engineer and have a plan laid out on paper and filed with the city clerk. We are unable to appreciate how such a meaning can be read out of the pleading. It seems to have been supposed that the allegation that the sewage system was constructed part at one time and part at another, is so inconsistent with its not having been constructed according to any plan adopted by the city, that the pleader's purpose must have been to charge mere failure to cause a diagram to be made by a skilled person and filed. We cannot so construe the pleading. The more reasonable view seems to be, that the pleader in charging municipal neglect to adopt a plan for the sewage system had in mind such a plan as, if it had been adopted, would exempt the city from liability for defects in respect thereto under the familiar rule on the subject. That was the only kind of a plan material to the controversy. If the pleading will reasonably bear the construction which the learned court gave to it, it will also bear the one we have suggested, if indeed it be necessary to resort to construction in order to read that out of the paper. By a familiar rule, the permissible construction which will support a pleading should be adopted rather than the one which will defeat it. *Miller v. Bayer*, 94 Wis. 123, 68 N. W. Rep. 669; *Ean v. Chicago, M. & St. P. R. Co.*, 95 Wis. 69, 69 N. W. Rep. 997; *Emerson v. Nash (Wis.)*, 102 N. W. Rep. 921.

If we were to come to the same conclusion as did the trial court on the point above discussed, it would not affect the final result, since the complaint states that appellant had no knowledge of the insufficiency of the sewage system prior to the demonstration thereof by the flooding of his property, as alleged, and that the city had such knowledge prior thereto and failed to remedy the defect, or to make any effort in the matter though there was ample opportunity for efficiently doing so. A mistake of judgment in the adoption of a sewage system is one thing, inexcusable omission to remedy demonstrated defects in one, liable, in view of the manner in which such system is designed to be used, to directly invade and injure private property, is quite another thing. The former involves mere error of judgment, the latter failure to perform a duty which the city owes to the persons whose property is liable to be so injured. It is not only the duty of a city to exercise ordinary care in constructing its sewage system but also in maintaining it. That is breached by constructing a system known to be so defective as to necessarily cause injury to private rights, or continuing it without making reasonable efforts to remedy known defects therein,

which would otherwise naturally and directly cause such injury. *Tate v. City of St. Paul*, 56 Minn. 527, 58 N. W. Rep. 158, 45 Am. St. Rep. 501; *City of Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Selfert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. Rep. 321, 54 Am. Rep. 664. In the last case cited the court said:

"We are also of the opinion that the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continuous, but is remediable by a change of plan, or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper."

That case and the others cited, as also the elementary works on the subject (see 10 Am. & Eng. Ency. Law [2d Ed.] 243), indicate that only defects in a plan duly adopted for a city sewage system, which, when put in operation according to the design, result in some direct injury to private rights, is within the rule rendering a city liable for failure to proceed with ordinary care, after notice of the facts, to remedy the matter. However, since, where a sewer is constructed under such circumstances as those stated in the complaint it is designed that the abutting property owners shall connect their property therewith, if the operation of the system with connections thus made, by reason of a defect in the plan of the system, results in water flowing from the sewer to the private property with injurious effects, such injury is direct within the meaning of the cases cited. It was so held, in effect, in *Tate v. City of St. Paul*, *supra*. Judge Thompson in his work (section 5376), formulated the rule thus:

"But even if it were a good answer to make to the injured property owner, that the city had made a mistake in its plan, yet it would not be so after the city had acquired a knowledge of the inadequacy of the plan and of the injury inflicted thereby upon the property owner; since it would be its duty to abate the evil by changing its plan and rectifying its error."

That seems to accord with familiar principles covering the liability of a municipality for negligence. We adopt it. The allegations of the complaint before us call for its application. In the light thereof the pleading states a good cause of action independently of the first subject discussed, unless the contrary must prevail; because the defective character of the sewer was rendered operative to the injury of plaintiff's property through the medium of his private drain.

We are unable to approve the decision that, in a case like this, the injured property owner is remediless because of the existence of his private drain. Plaintiff had a legal right to connect his

property with the main sewer, as he did. The sewer was constructed partly at his expense with the expectation and design that such connection would be made. An opening therefor was left by the city, which, in effect, represented to him that the connection could safely be made. No negligence whatever can be imputed to plaintiff because of his private drain up to the time he knew a discontinuance thereof was necessary to save his property from being injured. It would be exceedingly unjust to hold,—that if a city constructs a sewer in a public street at the expense, in whole or in part, of the owners of abutting property, upon the theory that such property will be specially benefited by the facilities afforded to drain the same by means of a proper connection with the sewer, and the result is that because of defects in the sewer, known to the city to be liable to cause direct injury to such property such an injury occurs,—the corporation can successfully answer the owner's claim for damages by alleging that had such connection not been made such injury would not have happened.

The cases relied upon by the trial court and the respondent's counsel on the subject above discussed we do not find in point. *Baxter v. Tripp*, 12 R. I. 310, seems to be an authority upon which great reliance is placed. There the property owner was permitted to connect his private drain with the main sewer only upon condition of his "executing to said city a release of all damages which may at any time happen to such estate in any way resulting from such connection." The plaintiff complied with that condition and his claim for damages was defeated solely on that ground. In *Graves v. City of Olean* (Sup.), 72 N. Y. Supp. 799, the overflow from the main sewer occurred at a time of unusually high water, and the decision was placed mainly on that ground. In *Sheriff v. City of Oskaloosa*, 120 Iowa, 442, 34 N. W. Rep. 904, the recovery was denied because the plaintiff was a mere licensee, and knew when he connected his property with the main sewer that it was insufficient and that by reason thereof injury had resulted from time to time for over a year to property in the vicinity of his premises. In *Dermont v. Mayor*, etc., 4 Mich. 435, the sewer was not constructed at the expense, in whole or in part, of the owners of abutting property. The plaintiff connected his premises with the sewer as a mere licensee. The decision was grounded on those circumstances. In *Roll v. City of Indianapolis*, 52 Ind. 547, the decision turned on the fact that the property owner, as a condition of making his connection with the main sewer, gave a release as in *Baxter v. Tripp*, *supra*. In all those cases it was inferentially, at least, held that liability would exist under such facts as are alleged in the complaint before us.

When the precise question we are dealing with was presented for decision in *City of Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. Rep. 743, the

court said: "We find that the authorities settled this question against the corporation, for it is held, without diversity of opinion, that the municipality is liable in such cases." See, also, on the same point, *Semple v. City of Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181; *Murphy v. City of Indianapolis*, 158 Ind. 238, 63 N. E. Rep. 469; *Barton v. City of Syracuse*, 36 N. Y. 54.

The general result of the foregoing is that a city is not liable for injurious consequences to property abutting on a street resulting from connecting such property with a public sewer constructed by the city in such street according to a plan adopted by its governing body,—such injury being referable to defects in such plan and not, in effect, an unconstitutional taking of such property. That rule does not apply where a sewage system is constructed without the judgment of the proper body being exercised in the matter in the adoption of a plan for the work, though the system is in fact constructed according to some plan. If a sewer is constructed by a city in one of its streets according to a properly adopted plan, but by error of judgment such a plan is defective so that, when the sewer is put in operation as contemplated, it causes direct injury to private rights, the municipality is liable if, after notice of the defect, it fails to act with reasonable diligence to remedy the same. When the design of a sewage system constructed by a city is that abutting property owners will connect their premises therewith, and they are required to pay for special benefits to such property by bearing in whole or in part the expenses of the work, and the operation of the sewer results in a direct invasion of such property through the medium of a private drain, the injury thus caused is direct within the meaning of the rule as to the duty of a municipality to use ordinary care to correct known imperfections in its sewage system liable to cause injury to property lawfully connected therewith. If a property owner exercises his right to connect his premises by a private drain with a public sewer, he not knowing of a defect therein, which by reason of such connection will produce injury to such property, and such injury is caused before he knows of the danger, or knowing thereof has reasonable time to guard against the same, his instrumentality in the matter will not preclude him from recovering compensation for the injury, if it is referable to negligence on the part of the city. Negligence in such a case may consist of failure to adopt a plan for the sewer; failure to exercise ordinary care in constructing the same; or failure to act with reasonable promptness to remedy defects in the plan, causing direct injuries to abutting property, after notice of the existence of such defects. These principles require us to hold that the complaint states a good cause of action.

The order appealed from is reversed, and the cause remanded with directions to overrule the demurrer and further proceed according to law.

NOTE.—Liability for Improper Construction by a Municipality of Sewers and Drains.—The most accurate statement of the correct rule to be applied to cases involving the question stated on the subject of this note which we have ever noticed is that contained in the closing paragraph of the court's opinion in the principal case. It is certainly true that a city which constructs a sewer carefully and after proper consideration and consultation as to the best plan, and thereafter keeps it in reasonable repair is not liable to the owner of an adjoining lot for mistake of the municipal authorities as to the original plan adopted. Thus, a city is not liable because of the sewer's lack of capacity to perform the work for which it was intended. *City of Little Rock v. Willis*, 27 Ark. 572; *Rozell v. City of Anderson*, 91 Ind. 591. Thus, a city is not liable to a lot owner for damage caused by the inadequacy of a street culvert to discharge the surface water where it has taken competent advice. *City of Aurora v. Love*, 95 Ill. 521; *Van Pelt v. City of Davenport*, 42 Iowa, 308, 20 Am. Rep. 622; *City of Atchison v. Challiss*, 9 Kan. 603; *Buckley v. City of New Bedford*, 155 Mass. 64, 29 N. E. Rep. 201; *Steinmeyer v. City of St. Louis*, 3 Mo. App. 256; *Stewart v. City of Clinton*, 79 Mo. 603; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Carr v. Northern Limited*, 35 Pa. 324, 78 Am. Dec. 342. Thus it has been held, that a city acting in good faith and within its quasi judicial power and discretion, is not liable for any private damage that may arise from the inadequacy of a sewer, though it delayed the enlargement thereof after knowledge of such inadequacy. *Hessian v. City of Wilmington* (Del. Super.), 27 Atl. Rep. 880.

A city, however, is not exempt altogether from mistakes in construction of its construction as the principal case clearly shows. Thus, a city is liable for damages where it constructs a sewer to carry off surface water, if the sewer is wholly insufficient, and the fact might have been known to the authorities by the exercise of reasonable care and judgment. *City of Peoria v. Eisler*, 62 Ill. App. 26. So also where a city left it to her engineer to determine the capacity of a ditch and culvert required to carry off the water of a natural stream, which was turned from its natural channel by the raising of a street, and the ditch and culvert had not the capacity to pass off the water, whereby it flowed back and damaged the adjacent lots, the court held that the city was liable for the damage. *City of Helena v. Thompson*, 29 Ark. 569. So also the construction of a sewer, rendered necessary by street improvements, of such incapacity that every sane man knows in advance that it will not afford any relief from the consequences of obstruction to the natural drainage caused by the filling of the street, renders the city liable for damages caused by an overflow. *City of Indianapolis v. Huffer*, 30 Ind. 235. The Missouri Court of Appeals has held that the act of determining the dimensions of a culvert is a ministerial and not a judicial act, and that a city is liable for all damages caused by the insufficiency of the dimensions. *Young v. City of Kansas*, 27 Mo. App. 101. See also to same effect, *Selfert v. City of Brooklyn*, 15 Abb. N. Cas. 97.

In Maine, the statute provides that "after a public drain is constructed, and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town, so as to afford a sufficient flow for all drainage entitled to pass through it." The supreme court of that state has construed that statute as imposing upon every city in the state the liability of an insurer as to its system of sewerage, which liability can in no case be affected even by

proof that the rains causing the overflow of the sewer were unusually severe. *Blood v. City of Bangor*, 66 Me. 154.

After a city has been notified of the flooding of certain premises through the insufficiency of its sewers, it is liable for subsequent floodings of such premises arising from the same cause. *Munk v. City of Watertown*, 67 Hun, 261, 22 N. Y. Supp. 227; *Chalkley v. City of Richmond*, 88 Va. 402, 14 S. E. Rep. 339, 29 Am. St. Rep. 730; *Tate v. City of St. Paul*, 56 Minn. 527, 58 N. W. Rep. 158, 45 Am. St. Rep. 501.

JETSAM AND FLOTSAM.

WARNING.

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CORRESPONDENCE.

THE LEGAL EFFECT OF THE USE OF THE TERMS
"WILLFUL, ABANDONED, RECKLESS AND WANTON
NEGLECT."

Editor of the Central Law Journal:

In the CENTRAL LAW JOURNAL of August 25th, 1906, on page 149, is found a full report of the case of Southwest Missouri Electric Ry. Co. v. Fry (Supreme Court of Kansas, July 7, 1905), 81 Pac. Rep. 462, and following it, on page 150, an editorial note on "The Legal Effect of the Use of the Terms Willful, Abandoned, Reckless and Wanton Neglect."

In the Fry case the petition averred that the deceased was killed by reason of one of defendant's cars, being "carelessly, negligently, recklessly, and wantonly" operated. The court says: "The petition averred that the injury was the result of the negligence of the defendant in operating its cars. If defendant was in doubt as to whether it was an action to recover damages for the careless and negligent management of the defendant's employees or a charge that the killing was wantonly and cruelly inflicted, it could have ascertained by a motion either to make the petition more definite and certain in this particular, or by a motion to strike out. The petition is sufficient to admit evidence that the injury was the result of the negligent conduct of defendant's em-

ployees, and the finding of the jury sustains that charge."

In the note it is said: "In the above case the jury found for the plaintiff, because there was evidence of negligence on the part of the street car company in managing that car, but did not find that it amounted to reckless or wanton negligence. * * * All that was necessary to have stated was, that the injury was negligently committed. But the greater includes the less, so that, if the jury found that the plaintiff was entitled to verdict it could only have been on account of simple negligence, although the allegations included the words wanton and reckless negligence. If the charge is wanton and reckless negligence and the jury found that the defendant was guilty of ordinary negligence the allegation would support a verdict. * * * If in a case where the petition charged wanton, willful and reckless negligence, the court should charge that the plaintiff could not recover in such suit unless the jury found the acts of the plaintiff to have been done wantonly, willfully and recklessly; there is no doubt but the court would be making a mistake, because wanton, willful and reckless, does not exclude the idea that the act may have, nevertheless, been negligently committed." The note as a whole discusses three distinct propositions:

(a) That negligence is the same thing as wanton and willful conduct; (b) that where wanton and willful conduct is alleged and proven, exemplary damages may be allowed; (c) whether a corporation is liable for exemplary damages, for the wanton and willful conduct of its servants. With the discussion of the last two propositions no fault can be found; but the first proposition is unsound upon principle, and unsupported by the authorities.

First: All that was decided in the Fry case was, that under the allegations in the petition, the verdict finding the defendant guilty, could be sustained, notwithstanding that the jury found specially that the conduct of the defendant's servants was not wanton or willful, because the petition alleged that the deceased came to his death through the "negligence" of defendant's servants. This result was arrived at by the court, and rightly so, by regarding the allegations of carelessness and negligence as separate and distinct from, the allegation of wantonness; that the former taken together constituted one cause of action, the latter taken alone, another cause of action. In this connection the court said: "If defendant was in doubt as to whether it was an action to recover damages for the careless and negligent management of the cars by the defendant's employees, or a charge, *i. e.*, an action, that the killing was wantonly and cruelly inflicted, it could have ascertained by a motion either to make the petition more definite and certain in this particular, or by a motion to strike out."

Second: The court did not decide, as is assumed in the note, that if the case before them had been one where the petition alleged only that the acts of defendant's servants were wanton and willful, that a verdict for plaintiff could have been sustained when they found specially that such acts were not wanton and willful, on the theory advanced in the note, that an allegation of a wanton and willful act could be sustained by proof of negligence, because "the greater includes the less."

Third: "Carelessness" and "negligence" are not lesser degrees of "wanton" or "willful" conduct or acts, but on the other hand (as said by Justice Cartwright in Chicago, R. I. & P. Ry. Co. v. Hamler, 215

Ill. 525-540, 74 N. E. Rep. 705-710): "Negligence and willfulness are as unmixable as oil and water. Willful negligence is as self-contradictory as guilty innocence."

Although often used by the courts, the terms "wanton negligence" and "willful negligence" are each a misnomer. There are many well defined distinctions between an injury caused by negligence, and one caused by a willful or wanton act. In the former there is no intent to injure, in the latter there is. In the former contributory negligence is a defense; in the latter it is not. In the former exemplary damages or "smart money" cannot be recovered; in the latter they can. In the former, the fellow-servant rule applies; in the latter it does not.

The foregoing propositions are amply sustained by the following authorities: 21 Am. & Eng. Ency. of Law, 2d Ed. 457; 7 Am. & Eng. Ency. of Law, 2d Ed. 443; Wabash Ry. Co. v. Kingsley, 177 Ill. 558; Belt Ry. Co. v. Banicke, 102 Ill. App. 642; Pennsylvania Co. v. Sinclair, 62 Ind. 301, 30 Am. Rep. 185; Peoria Bridge Co. v. Loomis, 20 Ill. 235-251; East St. Louis Ry. Co. v. Jenks, 54 Ill. App. 91-94; Chicago & Grand Trunk Co. v. McDonough, 112 Ill. App. 315; Proctor v. Southern Ry. Co. (S. Car.), 42 S. E. Rep. 427; Wabash Ry. Co. v. Speer, 156 Ill. 244; Chicago, B. & O. Ry. Co. v. Diebison, 88 Ill. 431; Girard Coal Co. v. Wiggins, 52 Ill. App. 69-82; Chicago B. & O. Ry. Co. v. Johnson, 103 Ill. 512; Chicago City Ry. Co. v. Jordan, 215 Ill. at page 397; Chicago, R. I. & P. Ry. Co. v. Hamler, 215 Ill. 525-540. This case also contains an excellent discussion, with citation of many authorities, of the question whether there is such a thing as degrees of negligence—and decides there is not.

From all of which it follows that if the declaration alleges the act of the defendant to have been wanton and willful, proof of negligence, only, will not entitle the plaintiff to recover; that an act which is wantonly and willfully done constitutes one cause of action; the same act, if done negligently constitutes another and entirely distinct cause of action.

JOHN R. COCHRAN.

Sycamore, Ill.

BOOK REVIEWS.

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HUMOR OF THE LAW.

Judge (impatiently interrupting a lawyer's carefully selected citations): Can't you take for granted that I understand an ordinary point of law?

Lawyer (cooly): Your honor, that's the mistake I made in the lower court, where I lost my case.

Judge Parry of the English judiciary tells of a feeble-looking man who was rebuked for supporting a ridiculous claim made by his wife. "I tell you candidly I don't believe a word of your wife's story," said Judge Parry. "Yer may do as yer like," replied the man mournfully, "but I've got to."

Russell Sage has a horror of lawsuits.

A clerk of Mr. Sage's said the other day:

"I sought out the chief one morning in his office.

"'You remember, sir,' I said, 'my complain against my wife's uncle?'

"'Yes,' he answered.

"'Well,' said I, 'the man is obdurate, and I think of bringing suit against him. What do you advise?'

"'Mr. Sage was silent a moment, frowning thoughtfully. Then he said:

"'Listen. When I was clerk in Troy, I had a case against a man that seemed quite as good as yours. I visited a prominent lawyer, and I laid the whole matter before him in detail. When I was through he told me that he would be delighted to take the case—that it was a case that couldn't lose.

"'It can't lose?' said I.

"'It can't lose,' he repeated.

I rose and took up my hat. I thanked the lawyer, and told him that I wouldn't bring suit after all. And then I explained that it was my opponent's side and not my own which I had laid before him."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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80. **HUSBAND AND WIFE—Capacity of Minor Wife to Sue.**—A married woman, though a minor, can, when aided and assisted by her husband, sue for the partition of property in which she is interested, without being authorized so to do by the judge, on the advice of a family meeting.—*Tobin v. United States Safe Deposit & Savings Bank*, La., 39 So. Rep. 33.

81. **INFANTS—Appearance by Attorney.**—An appearance by attorney for a minor would be deemed an appearance by the minor, and the court could continue the cause to another term and then appoint a guardian *ad litem*.—*Sears v. Duling*, Vt., 61 Atl. Rep. 518.

82. **INFANTS—Misrepresentation of Age.**—In an action for injuries to a minor servant, it was immaterial that at the time of his employment he misrepresented himself to be 14 years of age.—*Kirkham v. Wheeler Osgood Co.*, Wash., 91 Pac. Rep. 869.

83. **INJUNCTION—Trespass to Easement.**—An owner of an easement may enjoin a trespass thereon by one not entitled to the use of the easement, though such use is not materially impaired.—*Schmoele v. Betz*, Pa., 61 Atl. Rep. 525.

84. **INTOXICATING LIQUORS—Mule Tax.**—Under Code 1897, § 2455, a mule tax imposed by city on saloon keepers held a "tax."—*Ahlens v. City of Estherville*, Iowa, 104 N. W. Rep. 453.

85. **JUDGMENT—Res Judicata.**—Plaintiff, having taken no exception to the determination of a cause of action in a prior suit, held not thereafter entitled to claim that such right of recovery was not properly in issue therein.—*Dime Sav. Bank v. McAlenney*, Conn., 61 Atl. Rep. 476.

86. **JUDGMENT—Vacation where Default is Due to Excusable Neglect.**—That defendant would have lost his position as an employee of a corporation had he attended

the trial of an action against him held not ground for vacation of a judgment by default on the ground of inadvertence and excusable neglect.—*Peterson v. Crosier*, Utah, 81 Pac. Rep. 860.

87. **LANDLORD AND TENANT—Trespass to Easement.**—Tenant for 99 years, while in possession of the premises, can enjoin a third person trespassing on his easement.—*Schmoele v. Betz*, Pa., 61 Atl. Rep. 525.

88. **LIBEL AND SLANDER—Slander of Title.**—In a suit for slander of title, mere possession by the plaintiff will suffice, as against one defendant disclaiming title and another defendant setting up a tax title absolutely null.—*Posey v. Ducros*, La., 39 So. Rep. 26.

89. **LIBEL AND SLANDER—Venue.**—Where a newspaper mailed copies of a paper containing a libel to subscribers in other counties, he was punishable either in the county where the paper was published or in any county to which copies were sent, under Rev. Code Fr. Proc. §§ 72, 73.—*State v. Huston*, S. Dak., 104 N. W. Rep. 451.

90. **MASTER AND SERVANT—Assumed Risk.**—An employee, engaged in moving stone, assumes such risks as from the business he must have known, and such as by the exercise of his opportunities for inspection would have been disclosed to him.—*Bedford Quarries Co. v. Turner*, Ind., 75 N. E. Rep. 25.

91. **MASTER AND SERVANT—Assumed Risk.**—Fireman held to have assumed any additional risk arising from the fact that the engine was not equipped with driver brakes.—*Denver & R. G. R. Co. v. Scott*, Colo., 81 Pac. Rep. 763.

92. **MASTER AND SERVANT—Assumption of Risk.**—Defendant, in W's employ and by right on defendants' wharf, held not to assume the risk of negligence of defendant's employee.—*Ford v. Arbuckle*, 94 N. Y. Supp. 1097.

93. **MASTER AND SERVANT—Assumed Risk.**—In an action for injuries to an inexperienced employee, operating a switch of a construction railroad, whether defendant was guilty of negligence held for the jury.—*Mace v. H. A. Boedker & Co.*, Iowa, 104 N. W. Rep. 475.

94. **MASTER AND SERVANT—Contributory Negligence.**—Servant who voluntarily places himself in position of danger, instead of a position of safety, which he could easily adopt, held guilty of contributory negligence.—*Stratton v. C. H. Nichols Lumber Co.*, Wash., 81 Pac. Rep. 881.

95. **MASTER AND SERVANT—Obvious Danger.**—A servant held not guilty of contributory negligence in failing to investigate the machinery by which he was injured.—*Wilder v. Great Western Cereal Co.*, Iowa, 104 N. W. Rep. 484.

96. **MASTER AND SERVANT—Reliance on Direction.**—Servant held entitled to assume that he could safely do what he was directed by the foreman to do.—*Motzing v. Excelsior Brewing Co.*, 94 N. Y. Supp. 1113.

97. **MINES AND MINERALS—Location of Mining Claim.**—Location of mining claim held sufficient to entitle the locator to perfect it before other parties had acquired rights in the ground, although the boundaries were not fully marked when the location notice was posted.—*Brockbank v. Albion Min. Co.*, Utah, 81 Pac. Rep. 863.

98. **MORTGAGES—Failure to Record.**—An unrecorded mortgage is good as against the mortgagor or any one claiming under him with notice.—*Girard Trust Co. v. Baird*, Pa., 61 Atl. Rep. 507.

99. **MORTGAGES—Right to Possession.**—Where a mortgage contains no provision that the mortgagor may remain in possession, the mortgagee has not only the legal title, but the right to demand possession.—*City of Hagerstown v. Groh*, Md., 61 Atl. Rep. 467.

100. **NEGLIGENCE—Careless Driving.**—Plaintiffs held not guilty of contributory negligence as a matter of law, preventing their recovery for injuries to a horse, caused by the reckless driving of defendants' servant.—*Rhode v. Mantell*, 95 N. Y. Supp. 5.

101. **NEGLIGENCE—Dangerous Premises.**—Where the invitation of the owner of a building leads a person into

the basement thereof, the owner is liable for a failure to exercise reasonable care to prevent such person from falling into an ash pit there.—Withers v. Brooklyn Real Estate Exch., 94 N. Y. Supp. 328.

102. NEGLIGENCE—Explosion of Boiler.—Owner of boiler held not liable for damages to neighbor's property by explosion if he was not negligent.—Davis v. Charleston & W. C. Ry. Co., 8 Car., 51 S. E. Rep. 552.

103. NEGLIGENCE—Imputed Negligence.—The negligence of a parent will not bar an action by an infant child for injuries received by the negligence of defendant.—Mattson v. Minnesota & N. W. R. Co., Minn., 104 N. W. Rep. 443.

104. PARENT AND CHILD—Negligence of Parent.—The negligence of a parent will bar an action by him for loss of services of a minor child.—Mattson v. Minnesota & N. W. R. Co., Minn., 104 N. W. Rep. 443.

105. PARTIES—Unlawful Detainer.—A person executing a lease in his own name as owner may maintain unlawful detainer as trustee of an express trust, within Civ. Code, § 5.—Houck v. Williams, Colo., 81 Pac. Rep. 800.

106. PARTITION—Parties.—The fact that a presumptive heir of parties whose successions were partitioned was not made a party defendant in the partition proceedings will not necessarily render them and a sale made thereunder null.—Tobin v. United States Safe Deposit & Savings Bank, La., 89 So. Rep. 33.

107. PHYSICIANS AND SURGEONS—Burden of Proving Negligence.—In an action against a physician for malpractice, plaintiff has the burden of proving negligence by a preponderance of evidence, and not beyond a reasonable doubt.—Wood v. Wyeth, 94 N. Y. Supp. 360.

108. PRINCIPAL AND AGENT—Ratified Departure from Contract as to Cash Sales.—Although contract between principal and agent only authorizes cash sales, the acceptance by the principal of goods in trade is the equivalent of cash as to it.—Irwin v. Buffalo Pitts Co., Wash., 81 Pac. Rep. 849.

109. PROPERTY—Constructive Possession.—In the absence of actual possession of land in any one else, the holder of the title is deemed to be in constructive possession.—Ladd v. Powell, Ala., 39 So. Rep. 46.

110. PROPERTY—Possession.—Where plaintiff entered into a contract with the new owner of a horse, whereby he was to take care of the same, his right to the continued possession of the horse depended on such contract, and not on his prior possession of the horse.—Casto v. Murray, Oreg., 81 Pac. Rep. 883.

111. PUBLIC LANDS—Right of Homestead Entryman to Transfer Title.—A homestead entryman has, after making final proof, an equitable title to the land entered on, which may be transferred by him.—Peterson v. Sloss, Wash., 81 Pac. Rep. 744.

112. RAILROADS—Injury to Trespasser.—A city railroad speed ordinance held inapplicable in favor of a trespasser injured by being struck by one of defendant's trains within the city limits.—Clemans v. Chicago, R. I. & P. Ry. Co., Iowa, 104 N. W. Rep. 431.

113. RAILROADS—Negligence.—The issue of anything other than negligence of the railroad employees being the proximate cause of injury to a child four years old at a railroad crossing held not raised by the evidence.—Missouri, K. & T. Ry. Co. of Texas v. Nesbit, Tex., 88 S. W. Rep. 891.

114. RAILROADS—Negligence of Driver and Companion at Crossing.—A railroad held not liable for the death of deceased at a crossing, where he joined with the driver of the vehicle in which he was riding in negligently attempting to cross in front of the train.—Colorado & S. Ry. Co. v. Thomas, Colo., 81 Pac. Rep. 801.

115. RECEIVERS—Attorney's Fees.—Fees for services rendered in receivership litigation, operating to reduce the trust fund, held not chargeable to such fund.—Myers v. Mutual Life Ins. Co., Ind., 75 N. E. Rep. 31.

116. REPLEVIN—Extinguishment of Possessory Right.—Replevin will not lie if plaintiff's right has been extinguished or sale has been transferred to defendant

prior to the commencement of the action.—Casto v. Murray, Oreg., 81 Pac. Rep. 883.

117. SALES—Direction of Verdict in Action for Breach.—In an action for breach of contract for the sale of certain household furniture and the unexpired term of the lease, direction of verdict for plaintiff for a single item of damage held error.—Fox v. Woods, 94 N. Y. Supp. 344.

118. SALES—Reliance on Representations.—Finding that a buyer of drugs relied on representations by the seller that the same could be administered to animals with safety held supported by the evidence.—Mann-Tankersly Drug Co. v. Cheairs & Son, Ark., 88 S. W. Rep. 573.

119. SEARCHES AND SEIZURES—Arrest Without Warrant.—Cr. Code 1902, §§ 26, 590, authorizing arrest by magistrates without warrant, held not a violation of Const., art. 1, § 16.—State v. Byrd, S. Car., 51 S. E. Rep. 542.

120. SEARCHES AND SEIZURES—Notice and Entry under Search Warrant.—By the express provisions of Code Cr. Proc., § 799, an officer may not break into a place under a search warrant, unless after due notice he refused admittance, and his doing so otherwise is a criminal offense, under Pen. Code, § 120.—Phelps v. McAdoo, 94 N. Y. Supp. 265.

121. SHERIFFS AND CONSTABLES—Foreclosure Sale After Expiration of Term.—A sheriff, who has begun to execute a writ for the sale of mortgaged property, can complete the execution, notwithstanding the expiration of his term of office.—Ayers v. Casey, N. J., 61 Atl. Rep. 452.

122. SHIPPING—Res Ipsa Loquitur.—In case of accident from the parting of a hawser used to bring vessels alongside a wharf, held, that the doctrine of *res ipsa loquitur* applies.—Duhme v. Hamburg-American Packet Co., 94 N. Y. Supp. 1162.

123. STREET RAILROADS—Contributory Negligence in Standing too near Track.—Pedestrian, standing near curve in street car track, held bound to step back sufficiently to avoid being struck by the overhang of an approaching car.—Matulewicz v. Metropolitan St. Ry. Co., 95 N. Y. Supp. 7.

124. SUBROGATION—Proceedings by Creditors.—Creditors cannot procure subrogation to deceased surety's rights in indemnity mortgage in a proceeding to which the surety's heirs or representatives are not parties.—Dyer v. Jacoway, Ark., 88 S. W. Rep. 501.

125. TAXATION—Attorney's Fees for Collecting Inheritance Tax.—Under Inheritance Tax Law (Acts 1904, No. 45), § 4, the tax collector is not entitled to reimbursement for the fee of an attorney retained by him to prosecute a suit for the tax.—Succession of Levy, La., 89 So. Rep. 87.

126. TAXATION—Double Taxation.—The listing and taxation for moneys and credits in one jurisdiction does not necessarily affect the liability of the owner to pay taxes thereon for the same year in another jurisdiction.—Stevens v. Carroll, Iowa, 104 N. W. Rep. 433.

127. TAXATION—Tax Title.—Prescription does not run against an owner in possession, in favor of a tax title, based upon a certain adjudication to the state.—Posey v. Ducros, La., 89 So. Rep. 26.

128. TELEGRAPHS AND TELEPHONES—Office Hours on Sunday.—If a telegraph company opens its office for business on Sunday, it must have reasonable hours therefor.—Smith v. Western Union Telegraph Co., S. Car., 51 S. E. Rep. 537.

129. TRIAL—Argument of Counsel.—Argument of counsel that the jury should err, if at all, in giving excessive damages for personal injuries, as this could be cured on appeal, held improper.—Missouri, K. & T. Ry. Co. of Texas v. Nesbit, Tex., 88 S. W. Rep. 891.

130. TRIAL—Cause of Injury Question for the Jury.—In an action against a landlord for injury to plaintiff while residing with a tenant of defendant, whether the elements of which the plaintiff complained were due to her

fall held question for jury.—*Lee v. Ingraham*, 94 N. Y. Supp. 284.

131. **TRIAL**—Contributory Negligence.—Where contributory negligence appears from the evidence, it is immaterial whether it appears from the evidence of defendant or from that of plaintiff.—*Pittsburg, C. C. & St. L. Ry. Co. v. Reed, Ind.*, 75 N. E. Rep. 50.

132. **TRIAL**—Instructions.—Failure of court to indicate in logical sequence how instructions modify each other held not ground for reversal.—*Keyes v. Winnsboro Granite Co., S. Car.*, 51 S. E. Rep. 549.

133. **TRIAL**—Special Findings at Variance with General Verdict.—In an action for injuries resulting from the breaking of a stone being moved with a derrick, special findings held in irreconcilable conflict with the general verdict.—*Bedford Quarries Co. v. Turner, Ind.*, 75 N. E. Rep. 25.

134. **TRUSTS**—Trustees Duty to Account.—Children to whom land was conveyed by their mother held not trustees in such sense as to be obliged to account to other children for alleged trust funds invested in the land.—*Webb v. Webb, Iowa*, 104 N. W. Rep. 438.

135. **VENDOR AND PURCHASER**—Duty to Search Record.—Purchaser of land which was once entered on under the homestead law is bound to search the record for conveyances made by the entryman subsequent to making final proof and prior to the issuance of a patent.—*Peterson v. Sloss, Wash.*, 81 Pac. Rep. 744.

136. **VENDOR AND PURCHASER**—Mistake as to Quantity.—Purchaser of lots, who was misled as to the depth of the lots purchased, held not entitled to interest on the difference in value between the land purchased and that which he thought he purchased.—*Thrush v. Graybill, Iowa*, 104 N. W. Rep. 472.

137. **VENDOR AND PURCHASER**—Restriction in Deed.—A purchaser held chargeable with knowledge of the purposes for which a restriction was inserted in a deed in his chain of title.—*Hemsey v. Marlborough House Co., N. J.*, 61 Atl. Rep. 455.

138. **VENDOR AND PURCHASER**—Vendor's Lien.—Note given for balance due from purchaser to vendor held not to intermix amounts due for personality and amount due on the land, so as to result in a loss of the vendor's lien.—*Nance v. Gray, Ala.*, 38 So. Rep. 916.

139. **WATERS AND WATER COURSES**—Appropriation.—In a suit to establish water rights in a stream, a decree awarding defendant, as a prior appropriator, one-half and three-fourths of a cubic foot per second in the dry and wet season of the year, respectively, held proper.—*Minnie Maun Reservoir & Irrigation Co. v. Grames, Utah*, 81 Pac. Rep. 893.

140. **WATERS AND WATER COURSES**—Damage by Seepage from Irrigation Canal.—Owners of an irrigation canal are not liable as insurers for injuries sustained to adjoining property by seepage or overflow from the ditch, but are only liable for negligence.—*Howell v. Big Horn Basin Colonization Co., Wyo.*, 81 Pac. Rep. 785.

141. **WATERS AND WATER COURSES**—Damage by Waste Water from Irrigation Canal.—Owners of an irrigation canal and basin, held liable at common law for injuries to a landowner by waste water flowing therefrom, whether the basin constituted a reservoir, within Rev. St. 1899, § 974, or not.—*Howell v. Big Horn Basin Colonization Co., Wyo.*, 81 Pac. Rep. 785.

142. **WATERS AND WATER COURSES**—Negligent Construction of Irrigation Ditch.—Construction of an irrigation ditch held negligent, rendering defendant liable for injuries to plaintiff's land by seepage therefrom.—*Howell v. Big Horn Basin Colonization Co., Wyo.*, 81 Pac. Rep. 785.

143. **WATERS AND WATER COURSES**—Riparian Rights.—Evidence of the custom of other textile mills as to their use of water power held admissible on the question of the reasonableness of defendant's use of a stream.—*Hazard Powder Co. v. Somersville Mfg. Co., Conn.*, 61 Atl. Rep. 519.

144. **WILLS**—Acceptance of Devise.—One who accepts a

devise charged with the payment of the unpaid purchase money on the property devised is not a purchaser for value, but occupies the same position as other specific devisees and legatees.—*Gordon v. James, Miss.*, 89 So. Rep. 18.

145. **WILLS**—Confidential Relations.—Beneficiary, holding confidential relations with testatrix and drawing her will, held bound to show that the alleged will merely expresses the intention of the testatrix.—*In re Egan's Will*, 94 N. Y. Supp. 1064.

146. **WILLS**—Notice in Suit to Set Aside.—It will be presumed that, on a hearing at which a will was set aside, all parties in interest were duly notified.—*Crockett v. Sibley, N. H.*, 61 Atl. Rep. 469.

147. **WILLS**—Provision in Lieu of Dower.—Where a will gave testator's widow certain realty and a legacy from "the remainder of the estate" in lieu of dower, she was not entitled to interest on the legacy from the date of the husband's death.—*In re Martens*, 94 N. Y. Supp. 297.

148. **WILLS**—Undue Influence.—Undue influence, sufficient to set aside a will, must be such as subjects the will of the testator to that of the person exercising the influence, and makes the instrument express his purpose.—*Parker v. Lambertiz, Iowa*, 104 N. W. Rep. 452.

149. **WILLS**—Validity of Nuncupative Will.—A nuncupative will by private act is not invalid because written in the presence of the five attesting witnesses without formal dictation, under Civ. Code, art. 1649.—*Succession of Reems, La.*, 38 So. Rep. 930.

150. **WITNESSES**—Competency of Defendant.—Where two defendants were jointly indicted for larceny, and before trial one pleaded guilty, such fact, under the direct provisions of the statute, did not disqualify him as a witness.—*Wells v. Territory, Okla.*, 81 Pac. Rep. 425.

151. **WITNESSES**—Cross-Examination.—Where the state brings out part of a conversation, the defendant may bring out the balance on cross-examination, but only so far as it relates to the same subject-matter.—*Braham v. State, Ala.*, 38 So. Rep. 919.

152. **WITNESSES**—Cross-Examination.—Where a witness on direct examination had testified concerning a conversation with an incompetent, it was proper on cross-examination to ask him as to all of such conversation.—*In re Hayden's Estate, Cal.*, 81 Pac. Rep. 668.

153. **WITNESSES**—Declarations of Defendant.—Declarations of defendant, on trial for murder, as to what he was going to do, held admissible in his defense.—*State v. Dean, S. Car.*, 51 S. E. Rep. 524.

154. **WITNESSES**—Husband and Wife.—A woman who has been divorced from her husband is a competent witness against him, except as to a communication made by one to the other during marriage.—*State v. Nelson, Wash.*, 81 Pac. Rep. 721.

155. **WITNESSES**—Impeachment.—In an action for salary, defendant held entitled to prove by plaintiff, on cross examination to impeach his testimony, that he had previously recovered a judgment against defendant by default, which had been set aside for fraud and collusion.—*Masters v. Seeley, U. S. C. C. of App., Fourth Circuit*, 188 Fed. Rep. 719.

156. **WITNESSES**—Impeachment.—Where a witness admitted that he had pleaded guilty to a common assault, it was proper to show, as affecting his credibility, that he had pleaded guilty to a charge of assault with intent to kill.—*State v. Forsha, Mo.*, 88 S. W. Rep. 746.

157. **WITNESSES**—Impeachment.—To impeach a witness by a letter written by him, he must be first interrogated on the portions to be used for impeachment.—*State v. Rogers, La.*, 38 So. Rep. 952.

158. **WITNESSES**—Trade Secrets.—In an action to recover goods alleged to have been fraudulently purchased, one of the officers of the ultimate buyer held not entitled to refuse to answer certain questions, on the ground that they were irrelevant and required a disclosure of trade secrets.—*In re Park, U. S. C. C., S. D. Ohio*, 188 Fed. Rep. 421.